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No. _____

In The

Supreme Court of the United States

October Term, 1991

PAUL J. HEMME,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

Petition For Writ Of Certiorari To The Kansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a statement not made under oath or recorded before the Magistrate, absent incorporation by the Affiant, but attached to the Officer's Affidavit be used in the probable cause equation?

2. The requisites necessary to allow for the application of the "GOOD FAITH EXCEPTION".

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STATE OF KANSAS,

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Paul J. Hemme, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Kansas Supreme Court entered in this proceedings on May 9, 1991, denying the Petitioner's Petition for Review filed herein in relation to the Kansas Court of Appeals' Opinion and Judgment of February 1, 1991.

OPINION BELOW

The Opinion of the Kansas Court of Appeals has been published and can be found in 15 Kan.App.2d 198 (1991),

however, it is additionally appended hereto (A. A1-A17) The Order of the Kansas Supreme Court dated May 9, 1991, denying the Petitioner's Petition for Review filed herein is further appended hereto. (B. B1)

JURISDICTION

The judgment of the Kansas Court of Appeals was entered on February 1, 1991. The Order of the Kansas Supreme Court denying the Petitioner's Petition for Review was entered on May 9, 1991. This Court's jurisdiction is invoked under the Court's Rule 10(b)(c), 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Fourth Amendment, United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The relevant portions of K.S.A. 22-2502 provides in part:

> "A search warrant shall be issued only upon the oral or written statement of any person under oath or affirmation which states facts sufficient to show probable cause that a crime has been or

is being committed and which particularly describes a person, place or means of conveyance to be searched and things to be seized. *Any statement which is made orally shall be either taken down by a certified shorthand reporter, sworn to under oath and made part of the application for a search warrant, or recorded before the Magistrate from whom the search warrant is requested and sworn to under oath.*" (Emphasis added)

K.S.A. 65-4127a:

"*Possession and distribution of opiates, opium or narcotic drugs; penalties.* Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to manufacture, possess, have under his control, possess with intent to sell, sell, prescribe, administer, deliver, distribute, dispense or compound any opiates, opium or narcotic drugs. Any person who violates this section shall be guilty of a class C felony, except that, upon conviction for the second offense, such person shall be guilty of a class B felony, and upon such conviction for a third or subsequent offense, such person shall be guilty of a class A felony, and the punishment shall be life imprisonment."

K.S.A. 65-4127b, relevant portions:

"*Manufacture, possession, disposition or sale of depressant, stimulant or hallucinogenic drugs; penalties.* (a) Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to manufacture, possess, have under such person's control, prescribe, administer, deliver, distribute, dispense or compound:

(1) Any depressant designated in subsection (e) of K.S.A. 65-4105, subsection (e) of K.S.A. 65-4107, subsection (b) or (c) of K.S.A. 65-4109 or subsection (b) of K.S.A. 65-4111, and any amendments thereto;

(2) any stimulant designated in subsection (d) or (f) of K.S.A. 65-4107 or subsection (e) of K.S.A. 65-4109, and any amendments thereto;

(3) any hallucinogenic drug designated in subsection (d) of K.S.A. 65-4105, and any amendments thereto; or

(4) any substance designated in subsection (c), (d), (e) or (f) of K.S.A. 65-4111, and any amendments thereto.

Any person who violates this subsection shall be guilty of a class A misdemeanor, except that upon conviction for a second or subsequent offense, such person shall be guilty of a class D felony."

K.S.A. 21-3301 provides:

"*Attempt.* (a) An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime.

(b) It shall not be a defense to a charge of attempt that the circumstances under which the act was performed or the means employed or the act itself were such that the commission of the crime was not possible.

(c) Except as otherwise provided by law:

(1) An attempt to commit a class A felony is a class B felony.

(2) An attempt to commit a class B felony is a class C felony.

(3) An attempt to commit a class C felony is a class D felony.

(4) An attempt to commit a class D felony is a class E felony.

(5) An attempt to commit a class E felony is a class A misdemeanor.

(6) An attempt to commit a class A misdemeanor is a class B misdemeanor.

(7) An attempt to commit a class B or C misdemeanor is a class C misdemeanor.

28 U.S.C. § 1746:

"Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)'.

(2) If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)'."

STATEMENT OF THE CASE

The Petitioner, Paul J. Hemme, was charged in an Amended Complaint, Count 1, alleging violations of K.S.A. 65-4127a and K.S.A. 21-3301; Count 2 of the Amended Complaint alleging a violation of K.S.A. 65-4127b(b)(3). (R. Vol. I, p. 7) The Appellant's Motion to Suppress was denied on September 29, 1989, following the hearing on that Motion on July 20, 1989. Based upon an Agreed Stipulation of Facts, the Appellant's trial to the Court came to pass on October 4, 1989, at which time the Appellant was convicted on both Counts, while preserving the issue of the validity of the Search Warrant, the Petitioner's Motion to Suppress, herein for the appeal.

The Court on December 5, 1989, sentenced the Appellant in relation to Count 1 of the Amended Complaint to the custody of the Secretary of Corrections for a minimum term of one (1) year and a maximum term of five (5) years, K.S.A. 1988 Supp. 21-4501(e), and on Count 2 of the Amended Complaint to a term of not less than three (3) years nor more than ten (10) years pursuant to K.S.A. 1988 Supp. 21-4501(d)(1)(2). The Court directing the sentence imposed herein to run concurrently. (R. Vol. I, pp. 10-12)

STATEMENT OF FACTS

The State's attorney, Michael Hayes, presented the Stipulation of Facts during the trial to the Court on October 4, 1989. (R. Vol. IV, p. 10) The evidence, in large part, parallels the "voluntary statement" given by

Kasandra Riley in support of the Affidavit and Application for Search Warrant herein, the "statement" being fully reproduced in Appendix C to this Petition. As the Stipulation reflects, Kasandra Riley had been to Petitioner Hemme's residence supposedly to purchase drugs from Mr. Hemme, although the dates of these visits are not divulged, and Ms. Riley's "purchases" in no way meet the requirements of any sort of controlled buy. (R. Vol. IV, p. 10) The facts throughout reveal a complete lack of corroborative efforts on the part of the investigating authorities, except for the Affiant's verification of the description of the Petitioner's residence. The Affidavit and Application are found in Appendix C (A.C-1)

The basic facts that allowed for the issuance of the search warrant herein on September 26, 1989, which allowed for the search and seizure of the Petitioner's residence. The Kansas Court of Appeals found that the statement of Kasandra Riley was attached to the sworn Application for the Search Warrant by the "requesting officer" that Kasandra Riley's statement did not have to be sworn to under the provisions of K.S.A. 22-2502, as "the Court's review of conclusions of law is unlimited", yet the Court found in relation to Riley's statement that "the better practice would have been to bring her before the magistrate and let her testify in person under oath".

The Court then found in the Application for the Search Warrant that the only police corroboration viewed therein would not suffice for a finding of probable cause. The Court further agreed with the Petitioner that there is insufficient verbage "to conclude he was still keeping drugs in his house" (the Petitioner).

The Court further disagreed "with the Magistrate's conclusion of the totality of the circumstances, he did not lose his neutrality, detached role, or objectivity in reaching his conclusion".

The Court of Appeals further found the warrant's salvation was the use of the "good faith exception" without addressing the caution found in footnote 3 of the warrant's application, as more fully addressed hereinafter. The Petitioner has attached to his Petition, in Appendix C, the Search Warrant Application; Appendix D, the Statement of Kasandra Riley; and in Appendix E, the trial court's findings.

The Kansas Court of Appeals at page 4 of the Court's Opinion, (A. A-4), as did the trial court, Appendix, (A. E-2), found "that the Application for the Search Warrant was sworn to by the requesting officer and that the informant's statement did not have to be sworn to under the provisions of K.S.A. 22-2502. We agree". The Court further found at A. A-4 of the Court's Opinion "whether the statute disallows an unsworn statement to be used by the Court where a probable cause determination is a question of law and the Court (Court's) review of conclusions of law is unlimited". The Court further qualified this finding at page A. A-6 of the Court's Opinion where the Court found "here, the officer took the next step, in addition to his sworn affidavit, by attaching the hearsay evidence he possessed, which is arguably a better procedure, as long as he has sworn to everything in the hearsay statement". The Court again further modified the Court's finding at A. A-10 of the Court's Opinion by finding that "the better practice would have been to bring

her before the magistrate and let her testify in person under oath".

In review of Officer Ewing's Affidavit, Appendix A. C-1, 4(j), the officer wisely did not incorporate Riley's statement in his Affidavit, but merely attached same. Her statement was not taken down by a certified shorthand reporter and sworn to under oath to allow for it being made part of the application, was not recorded before the Magistrate and sworn to under oath, yet became a part of the Application in violation of K.S.A. 22-2502(a). The only thing the officer swore to in relation to the hearsay statement was that Riley was the provider of the information and that the officer only verified the legal description of the Petitioner's residence. The statute clearly requires for recordation that it be taken down by a certified shorthand reporter or recorded before the Magistrate, in both instances that it be sworn to.

The Petitioner has attached to his Petition for Certiorari in Appendix A, the Opinion of the Kansas Court of Appeals; Appendix B, the Opinion of the Kansas Supreme Court; Appendix C, the Affidavit and Application for Search Warrant; Appendix D, the Statement of Kasandra Riley; and Appendix E, the Trial Court's Finding of September 29, 1989 in denying the Petitioner's Motion to Suppress.

REASONS FOR GRANTING THE WRIT

1. **"The Fourth Amendment provides that no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the things to be seized." (*Stanford v. Texas*, 379 U.S. 476, 481, 13 L.Ed.2d 431, 434-435, 89 S.Ct. 506 [1965]; *Chimel v. California*, 395 U.S. 752, 761, 29 L.Ed.2d 685, 692-693, 89 S.Ct. 2034 [1969]; *Michigan v. Summers*, 452 U.S. 692, 694 n.2, 69 L.Ed.2d 344, n.2, 101 S.Ct. 2587 [1981])**

With the above in mind, if we then review Officer Ewing's Affidavit (4(j) A. C-1), the Officer wisely did not incorporate Riley's statement in his Affidavit, but merely attached same. Her statement was not taken down by a certified shorthand reporter and sworn to under oath to allow for the statement being made a part of the Application; was not recorded before the Magistrate and sworn to under oath, yet became a part of the Application in violation of K.S.A. 22-2502(a), as the only thing the Officer swore to in relation to the hearsay statement was that Riley was the provider of the information and the officer only verified the legal description of the Petitioner's residence. The statute clearly requires for recordation that it be taken down by a certified shorthand reporter or recorded before the Magistrate, in both instances that it be sworn to.

The statement of Kasandra Riley, not being under oath or recorded before the Magistrate, then this question becomes one of constitutional compliance and not statutory construction. (*State v. McMillin*, 206 Kan. 3, 6, 476 P.2d 612 [1970]) The informant's statement not being incorporated by reference in the Officer's Affidavit as authorized by K.S.A. 60-210(c) prevents the informant's

statement from consideration in the probable cause equation as the other deficiencies in relation to the probable cause determination were both raised by the Petitioner and agreed to by the Court of Appeals. (*State v. Maley and Witt*, 8 Kan.App.2d 553, 560, 662 P.2d 269 [1983]; *United States v. One Olivetti Electric Ten Key Adding Machine*, 406 F.2d 1167, 1168 [5th Cir., 1969]; *United States v. Brooks*, 303 F.2d 851, 852 [6th Cir., 1962]) Further in review of the Affidavit and the attachment thereto we find no minimal attempt to comply with the provisions of 28 U.S.C. § 1746.

Further, the provision of K.S.A. 22-2502(a) "requires that the oral statements relied on to support a warrant be given under oath and reduced to writing. This was not done in this case, and we must assume that the warrant was issued solely on the basis of the contents of the Affidavit," the contents being fatally deficient herein. (*State v. Jacob*, 8 Kan.App.2d 729, 732, 667 P.2d 397 [1983]; *United States v. Hittle*, 575 F.2d 799, 801-802 [10th Cir., 1978])

2. THE REQUISITES NECESSARY TO ALLOW FOR THE APPLICATION OF THE "GOOD FAITH EXCEPTION".

THE REQUISITES IMPLYING "THE GOOD FAITH EXCEPTION"

The Kansas Court of Appeals at page 12 (A. A-12) commences in addressing the salvation afforded the warrant herein with the "good faith" exception, reflecting with the commencement of "BEYOND PROBABLE CAUSE", which suggests the fruits of the seizure should

be factored as a further test in the probable cause equation. The difficulty with the Court's reasoning in this regard is that it is wholly contrary to stare decisis, in that this fact was not included in the Warrant Application "or otherwise presented to the Court issuing the warrant; therefore, it cannot be used retroactively to correct the Warrant". (*Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 [1967]; *State v. Waldschmidt*, 12 Kan.App.2d 284, 287, 740 P.2d 617 [1987])

The Kansas Court of Appeals Opinion at page 14, (A. A-14) notes the Kansas Supreme Court's decision in *State v. Doile*, 244 Kan. 493; at 503, 769 P.2d 666 (1989) and concluded "apparently, the majority of the court found a level of gross failure to show probable cause, which the minority referred to as absence of objectivity by the magistrate and unreasonableness of the officers to believe the warrant was valid and which would leave the rule of *Leon* intact". The Court of Appeals apparently misconstrued the Kansas Supreme Court's generosity as suppression still remains intact in four instances: "when the judge or magistrate is deliberately misled by false information; (2) when the judge or magistrate wholly abandons his or her neutral and detached role; (3) when the warrant was so lacking in specificity that the officers could not determine the place to be searched or the things to be seized; and (4) when there was so little indicia of probable cause contained in the affidavit for the warrant that it was entirely unreasonable for an officer to believe the warrant was valid. 468 U.S. at 923". (*United States v. Leon*, 468 U.S. 897, 923, 82 L.Ed.2d 677, 698-699, 104 S.Ct. 3405 (1984); *State v. Doile*, 244 Kan. at 502; *State v. Probst*, 247 Kan. at 205)

In applying the *Leon* formula, the Court of Appeals made the following findings:

(1) "The only corroboration in the present case was confirmation of the defendant's address, which was not enough to establish reliability or credibility of the informant. (The Court's Opinion at page 10) (A. A-10)

(2) "There was insufficient probable cause to believe the drugs would still be at the defendant's residence at the time of the issuance of the search warrant based upon the lack of sufficient information as to the reliability and credibility of the informant and the lack of sufficient corroboration by the police when coupled with the lapse of time between her observations and her statement to the deputy". (The Court's Opinion at page 12) (A. A-12).

(3) "When we consider the neutrality and detached role of the magistrate, we note this was a reasonably close question. Although we disagree as to whether reliability and credibility of the informant were sufficiently demonstrated by the affidavit". (The Court's Opinion at page 16) (A. A-16)

(4) "While we disagree with the magistrate's conclusion of the totality of the circumstances, he did not lose his neutrality, detached role, or objectivity in reaching his conclusion". (The Court's Opinion at page 16) (A. A-16)

The Court failed to address the caution found in footnote 3 of Officer Ewing's Affidavit which was found in the Petitioner's Brief at page 14 further reproduced in Appendix C (A. C-1) which states in part:

> " . . . if by informant, describe how reliability verified – previous proven reliability, corroboration by other physical observation, etc. If necessary, attach additional papers and identify as exhibit. Reduce to writing any other relevant bolstering evidence brought out by Judge's oral inquiry into supporting facts under oath."

The Court failed to note that Officer Ewing provided two (2) descriptions of the property sought to be invaded (App.-C) the properties described the numbered paragraph a (h) as twenty acres East One-Half, Southwest One-Quarter of 35-10-18, Jefferson County, Kansas. The property is additionally described at numbered paragraph 3 as being the E 1/2 S/W 1/4 535 T10 R18, which went without correction.

The sum total of facts related in Officer Ewing's Affidavit is that he confirmed the Petitioner's address which the Court of Appeals, along with the Kansas Supreme Court, has determined was an "improper analysis of totality of the circumstances". (*State v. Olson*, 11 Kan.App.2d 485, 492, 726 P.2d 1347 [1986]; *State v. Doile*, 244 Kan. 493, 503, 769 P.2d 666 [1989])

Is it possible to reason that Officer Ewing as a reasonably well trained officer would not have known that the Search Warrant was illegal despite the Magistrate's authorization although the caution in his Application for the Search Warrant was disregarded or that he could reasonably have relied on the Warrant when the issuing Magistrate clearly abandoned his judicial role as his application lacked all indicia of probative cause, negating the "good faith exception". (*State v. Probst*, 247 Kan. 196, 205-206 [1990])

The recordation of Kasandra Riley's statement in the probable cause determination by the Magistrate for the reasons more fully addressed in Petitioner's initial point along

with the Kansas Court of Appeal's findings which are tantamount to a finding that the Magistrate both accepted facts reflecting "a level of gross failure to show probable cause" and "an absence of objectivity by the magistrate and unreasonableness of the officers to believe the warrant was valid and which would leave the rule of *Leon* intact", unless the Magistrate went without his glasses and the officer was unable to read.

The application herein clearly exceeded both "apparent tests", not to mention the abandonment of the caution found in Footnote 3 of the application.

To reason that the warrant's salvation is the good faith "exception" would allow for a warrant to issue on the basis of an application reflecting that the affiant needs a search warrant for a residence that I have verified the description of on information provided by an unknown informant, neither tried nor true, to seize contraband that was and may be located thereon.

CONCLUSION

For the above and foregoing reasons a Writ of Certiorari should issue to review the judgment and opinion in the Kansas Supreme Court along with the Kansas Court of Appeals.

Respectfully submitted,

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APPENDIX "A"

No. 64,696

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS,

Appellant,

v.

PAUL J. HEMME,

Appellant.

SYLLABUS BY THE COURT

1.

An informant's statement accompanying a sworn application for a search warrant is not required, under K.S.A. 22-2502, to also be sworn to.

2.

In considering all the factors to determine whether an application for a search warrant depends upon stale information and, thus, is not based upon probable cause, the trial court must ultimately find a logical link between the place to be searched, the property to be seized, and the criminal conduct.

3.

Contraband seized pursuant to a search warrant issued without probable cause will not be suppressed absent a showing (1) that the judge or magistrate who

issued the warrant was deliberately misled by false information; (2) that the judge or magistrate wholly abandoned his or her neutral and detached role; (3) that the warrant was so lacking in specificity that the officers could not determine the place to be searched or the things to be seized; or (4) that there was so little indicia of probable cause contained in the affidavit for the warrant that it was entirely unreasonable for an officer to believe the warrant valid. *State v. Probst*, 247 Kan. 196, 795 P.2d 393 (1990) (adopting the good faith exception set forth in *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405, *reh. denied* 468 U.S. 1250 [1984]).

Appeal from Jefferson District Court; GARY L. NAFZIGER, judge. Opinion filed February 1, 1991. Affirmed.

John C. Humpage, or Topeka, for appellant.

Michael C. Hayes, county attorney, and *Robert T. Stephan*, attorney general, for appellee.

Before DAVIS, P.J., GERNON, J., and RALPH M. KING, JR., District Judge, assigned.

KING, J.: After convictions of one count of attempted possession of cocaine (K.S.A. 21-3301 and K.S.A. 1990 Supp. 65-4127a) and one count of possession of marijuana with intent to sell (K.S.A. 1990 Supp. 65-4127b[b][3]), Paul J. Hemme appeals the denial of his motion to suppress evidence seized pursuant to a search warrant. K.S.A. 22-2502.

On January 26, 1989, officers in Jefferson County executed a search warrant issued for the residence of Paul Hemme. Some of the items seized included 90 pounds of

marijuana, a triple beam scale, forceps, lactose milk sugar, a jar with seeds, a paper with notations that are consistent with drug buys, a box of zip-lock baggies, and some glass vials with residue. Subsequently, many of these items tested positive for the presence of cocaine and marijuana.

Hemme moved to suppress the items seized pursuant to the search warrant, and a suppression hearing was held. Hemme contended the affidavit was defective. The court denied the motion to suppress. The case proceeded to a bench trial on stipulated facts, and the defendant was found guilty of attempted possession of cocaine and possession of marijuana with intent to sell. Hemme was sentenced to one to five years on the attempted possession of cocaine conviction and three to ten years on the possession of marijuana with intent to sell conviction.

The officer applying for the search warrant filed a sworn "Affidavit and Application for Search Warrant," to which he attached a signed, but unsworn, "voluntary statement" by Kasandra L. Riley. Hemme first contends that K.S.A. 22-2502 does not allow an additional unsworn statement to be attached to the affidavit supporting the search warrant.

Whether the statute in question disallows an unsworn informant's statement to be used by the court for a probable cause determination is a question of law, and "[t]his court's review of conclusions of law is unlimited." *Hutchinson Nat'l Bank & Tr. Co. v. Brown*, 12 Kan. App. 2d 673, 674, 753 P.2d 1299, *rev. denied* 243 Kan. 778 (1988).

The trial court essentially found that the application for the search warrant was sworn to by the requesting officer and the informant's statement did not have to be sworn to. We agree.

K.S.A. 22-2502 states in relevant part:

> "(a) A search warrant shall be issued only upon the oral or written statement of any person under oath or affirmation which states facts sufficient to show probable cause that a crime has been or is being committed and which particularly describes a person, place or means of conveyance to be searched and things to be seized. Any statement which is made orally shall be either taken down by a certified shorthand reporter, sworn to under oath and made part of the application for a search warrant, or recorded before the magistrate from whom the search warrant is requested and sworn to under oath."

Hemme argues the informant's statement falls under the requirements of the statute and must be a sworn statement. This ignores, however, the fact that the police officer included the facts supporting the application for the search warrant in his affidavit, which was in writing and was sworn to under oath. This met the requirements of the statute.

THE PROBABLE CAUSE INQUIRY

It is well settled that probable cause may be founded upon hearsay and information provided by informants. *Franks v. Delaware*, 438 U.S. 154, 165, 57 L.Ed. 2d 667, 98 S. Ct. 2674 (1978). The informant's identity does not need to be disclosed. 438 U.S. at 165. Here, the officer took the

next step, in addition to his sworn affidavit, by attaching the hearsay evidence he possessed, which is arguably a better procedure, as long as he has sworn to everything in the hearsay statement. The purpose of the statute is "to insure a means of examining the evidentiary basis of a search warrant if later questions [arise]." *Hearron v. State*, 10 Kan. App. 2d 229, 233, 696 P.2d 418, *rev. denied* 237 Kan. 886 (1985). If anything, the officer eliminated any question as to what the informant told him.

Hemme next contends there was not a substantial basis for finding probable cause to issue the search warrant. He asserts, among other things, the reliability and credibility of the informant is in question, there was no corroboration of the informant's information by the police officer, the affidavit lacked specific dates of drug buys by the informant, and the information alleged by the informant was stale.

The court, in *State v. Rose*, 8 Kan. App. 2d 659, 665 P.2d 1111, *rev. denied* 234 Kan. 1077 (1983), adopted the totality of the circumstances test for determining probable cause as set forth in *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983). The *Rose* court stated: "A judge, in determining whether to issue a search warrant, should consider the 'totality of the circumstances' presented and make a practical, common-sense decision whether there is a fair probability that contraband or evidence of a crime will be found in that particular place." 8 Kan. App. 2d 659, Syl. ¶ 2. "On appeal, the duty of the reviewing court is simply to ensure that the magistrate had substantial basis for concluding that probable cause existed." *State v. Abu-Isba*, 235 Kan. 851, Syl. ¶ 3, 685 P.2d 856 (1984).

Prior to *Gates*, a two-pronged analysis was required to establish the credibility and reliability of a confidential informant. *State v. Toler*, 246 Kan. 269, 272, 787 P.2d 711 (1990). The means by which the informant received the information, as well as the veracity of the informant or the reliability of the information, had to be shown in the affidavit. 246 Kan. at 272. These remain viable factors to be considered. *State v. Probst*, 247 Kan. 196, 202, 795 P.2d 393 (1990). There must be some indicia of accuracy of the informant's information. *State v. Olson*, 11 Kan. App. 2d 485, 491, 726 P.2d 1347, *rev. denied*, 240 Kan. 805 (1986).

Mere conclusions by the affiant are not sufficient to establish probable cause. *State v. Jacob*, 8 Kan. App. 2d 729, 731, 667 P.2d 397 (1983). As stated by the court in *State v. Morgan*, 222 Kan. 149, 151, 563 P.2d 1056 (1977):

> "Bald conclusions, mere affirmations of belief, or suspicions are not enough and, while an affidavit may be based on hearsay, there must be sufficient affirmative allegations of fact as to affiant's personal knowledge to provide a rational basis upon which a magistrate can make a judicious determination of probable cause."

This statement of the law was recently approved in *State v. Probst*, 247 Kan. at 202.

An examination of the affidavit supporting the search warrant indicates the affiant, Ronald Ewing, stated he came in contact with Kasandra Riley, who resided with an individual named Christopher Pifer and gave the address in Perry, Kansas. The informant related to him that, since October 1988, she had been ã guest in the home of Hemme and observed drugs and drug paraphernalia in the bedroom of the residence. She described the box that

contained baggies of cocaine. Riley informed Ewing she and Pifer had purchased cocaine during the visits and gave the price of the buys. She also related she observed Pifer buy marijuana. She knew the prices charged for various quantities of marijuana and cocaine. Two sections of the affidavit read as follows:

> "f) Riley advises affiant that Paul Hemme has visited her residence in the last month and had with him a quantity of cocaine and marijuana. That Hemme is a well known source of cocaine and marijuana by users of illicit drugs. That several parties owe Hemme large sums of U.S. currency from previously fronted drugs.
>
> "g) Riley advises affiant that she last visited the Hemme residence just prior to Christmas because of sickness and confinement to her residence by Pifer. That Hemme during this period had delivered cocaine to Pifer on one occasions [sic]."

In addition, the affidavit stated that the officer confirmed the address given by the informant as that of the defendant. The date of the affidavit was January 26, 1989.

The informant's statement, if reliable and credible, could support probable cause. What does the affidavit contain that related to her reliability and credibility? This 18-year-old woman had come to Jefferson County from Texas only recently. She was a drug user. There is no information as to her motivation to talk to officers. The affidavit is bereft of any information supporting her reliability and credibility, with the possible exception of specific information as to prices and a description of the

interior of the house. The officer did not have any relationship established whereby the informant had provided reliable information in the past

In the absence of any evidence establishing the reliability or credibility of the informant, corroboration by an independent police investigation would help establish probable cause. *State v. Olson*, 11 Kan. App. 2d at 491. But the only corroboration in the present case was confirmation of the defendant's address. This was not enough in *Olson* to establish the reliability or credibility of the informant, and it is not enough here. The better practice would have been to bring her before the magistrate and let her testify in person under oath.

A more serious problem with the affidavit is whether it relies upon stale information. The Kansas Supreme Court has stated: "The lapse of time which would tend to remove all probable cause for issuance of a search warrant by destroying any reasonable belief that drugs remain on the premises will depend on the facts and circumstances of each particular case." *State v. Jacques*, 225 Kan. 38, 42, 587 P.2d 861 (1978).

In that case, two days was not fatal. In *Hearron v. State*, 10 Kan. App. 2d at 232, an informant had seen stolen property within 72 hours of execution of the warrant.

The court, in *United States v. Myers*, 553 F. Supp. 98 (D. Kan. 1982), set forth the principle that probable cause dissipates with time unless the criminal activity is continuous. 553 F. Supp. at 103. The court summarized four factors to consider when analyzing whether the information relied upon in obtaining a warrant is stale. The first

is whether the criminal activity is continuous. The second is the time between the issuance of the warrant and the alleged criminal activity relied upon to establish probable cause. The third is the use of present or past tense verbs in the affidavit supporting a search warrant. Finally, the court looks at the likelihood the contraband would be moved from the location of the proposed search. Taking all of these factors into consideration, the court determined there must be a logical link between the place to be searched, the property to be seized, and the criminal conduct. 553 F. Supp. at 104-05.

Here the informant stated she first began to observe the criminal conduct in October 1988. She was last in Hemme's residence before Christmas of that same year. The affidavit for search warrant was prepared on January 26, 1989, at least a month later. Two to three months is not a long enough period to indicate a continuing course of conduct where there is no indication of the number of the informant's visits nor their regularity. The lapse of one month between the alleged criminal activity and the informant's statement to the deputy is also significant. Although she said the defendant made a house delivery to her in January, which might indicate a continuing pattern of sales, that is not sufficient to conclude he was still keeping drugs in his house, nor is the fact that people owed him money for drugs.

We find there was insufficient probable cause to believe the drugs would still be at the defendant's residence at the time of the issuance of the search warrant based upon the lack of sufficient information as to the reliability and credibility of the informant and the lack of sufficient corroboration by the police when coupled with

the lapse of time between her observations and her statement to the deputy.

BEYOND PROBABLE CAUSE

As we now know, the search warrant did, indeed, result in the seizure of 90 pounds of marijuana and other items. Must that evidence be suppressed?

In 1984, the United States Supreme Court carved out what has been referred to as the "good faith" exception to the exclusionary rule. See *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405, *reh. denied*, 468 U.S. 1250 (1984). The Court determined that the purpose of the exclusionary rule was to deter police misconduct. 468 U.S. at 916. The Court stated that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." 468 U.S. at 918. The Court established four situations in which the evidence seized pursuant to an invalid warrant should be suppressed. They are: (1) when the judge or magistrate is deliberately misled by false information; (2) when the judge or magistrate wholly abandons his or her neutral and detached role; (3) when the warrant was so lacking in specificity that the officers could not determine the place to be searched or the things to be seized; and (4) when there was so little indicia of probable cause contained in the affidavit for the warrant that it was entirely unreasonable for an officer to believe the warrant was valid. 468 U.S. at 923.

The Kansas Supreme Court addressed *Leon* in *State v. Doile*, 244 Kan. 493, 769 P.2d 666 (1989). This opinion left

open the question of whether the good faith exception to the exclusionary rule is operative in Kansas or whether it is encumbered with another layer or degree of probable cause finding. In *Doile*, the court found no probable cause existed for the warrant in question and stated that, to determine whether suppression was appropriate, the court must consider *Leon*. 244 Kan. at 501. The majority then analyzed the affidavit in light of the four situations in *Leon* and determined none of the exceptions were applicable. 244 Kan. at 502.

Under *Leon*, it appears this would be the end of the analysis and the evidence would not be suppressed, but the court went on to quote some preliminary probable cause language from earlier in the *Leon* opinion and concluded that, if the magistrate erred in applying the totality of the circumstances test in finding probable cause, the evidence must be suppressed. 244 Kan. at 503. Thus, the court suppressed the evidence without finding bad faith because there had been a five-year lapse in drug sales at the residence and because the affidavit did not contain any factual allegations from which the judge could have found probable cause. Apparently, the majority of the court found a level of gross failure to show probable cause, which the minority referred to as absence of objectively by the magistrate and unreasonableness of the officers to believe the warrant was valid and which would leave the rule of *Leon* intact.

Recently, the Kansas Supreme Court again addressed the good faith exception as set forth in *Leon*. *State v. Probst*, 247 Kan. 196. In *Probst*, the trial judge, ruling upon the search warrant he had issued, found no probable cause for the warrant to have been issued, and also found

that the magistrate (himself) had wholly abandoned his neutral or detached role and that no reasonable officer would have relied upon the probable cause determination. 247 Kan. at 205. Thus, the trial court found the good faith exception did not apply. 247 Kan. at 205-06.

The Supreme Court agreed and stated, "We conclude that under the unusual circumstances here, the district court did not err in finding that the affidavit for the search warrant lacked probable cause and that the good faith exception as promulgated by *Leon* did not apply in this case." 247 Kan. at 207.

We conclude the Kansas Supreme Court, in *Probst*, approved the good faith exception to the exclusionary rule, although it did not apply in that case.

Having found probable cause lacking, we now turn to the question of whether the good faith exception applies in this case, or rather whether this evidence should be excluded in furtherance of the exclusionary rule based upon the four tests of *Leon*.

We look at each *Leon* test for exclusion for bad faith. First, there is no evidence of any false statement in the affidavit. The location of Hemme's residence was correct, and the drugs and other items were where the informant said they would be.

When we consider the neutrality and detached role of the magistrate, we note this was a reasonably close question. Although we disagree as to whether reliability and credibility of the informant were sufficiently demonstrated by the affidavit, she was a known person, giving a voluntary statement, who demonstrated a knowledge of

the interior of the house, where things would be found, and the various prices for drugs. The fact that she was a drug user does not automatically exclude her ability to be reliable. Who else would be more likely to know what she knew? The 30-day delay is also a far cry from the five years of *Doile*, and the home delivery was some evidence of continuing activity. This affidavit did not contain mere conclusions. It contained facts. While we disagree with the magistrate's conclusion of the totality of the circumstances, he did not lose his neutrality, detached role, or objectivity in reaching his conclusion.

The specificity of this warrant is quite sufficient. The place, a residence, was located as described. The things to be seized, *i.e.*, drugs, scale, etc., were not only described, but were found.

Finally, looking at the indicia for probable cause for the officer serving the warrant to believe it was valid, we find nothing out of the ordinary. It is a routine search warrant based upon an officer's affidavit which in turn was based upon the statement of a person who gave him a lot of facts, one of which – the location of the residence – he was able to verify.

None of the four *Leon* tests for exclusion of evidence for bad faith require exclusion of the evidence in this case. Based upon the *Leon* good faith exception to the exclusionary rule, we affirm the denial of the motion to suppress.

APPENDIX "B"

SUPREME COURT ORDER

DISTRICT CASE NO. 89CR37

IN THE SUPREME COURT
OF THE STATE OF KANSAS

***** FLAT-FILE-COPY *****

STATE OF KANSAS, APPELLEE,
V NO. 90-64696-AS
PAUL J. HEMME, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN IN THE ABOVE ENTITLED CASE:

PETITION FOR REVIEW BY PAUL J. HEMME. CONSIDERED BY THE COURT AND DENIED.

DATE: 05/09/91.

YOURS VERY TRULY,
LEWIS C. CARTER
CLERK, SUPREME COURT

APPENDIX "C"

IN THE DISTRICT COURT OF JEFFERSON COUNTY, KANSAS

AFFIDAVIT AND APPLICATION FOR SEARCH WARRANT No. _____
Dkt. _____, Pg. _____

STATE OF KANSAS, COUNTY OF JEFFERSON:

Dated 1-26, 1989, at 5:58 P.M.

Ron Ewing, Deputy with the Jefferson County Sheriff's Department being first duly sworn on oath, says that he has reason to believe as follows:

1. The following crime or crimes are being or have been committed:[1] Possession of Marihuana in violation of K.S.A. 65-4127b(a)(3); Possession with intent to sell Marihuana in violation of K.S.A. 65-4127b(b)(3); Possession of Cocaine in violation of K.S.A. 65-4127a; Possession with intent to sell Cocaine in violation of K.S.A. 65-4127a; (see attached sheet)

2. The following particularly described terms are contained: evidence, illegible, or instrumentalities of said crime or crimes: Cocaine, its salts, isomers and salts of isomers, paraphernalia commonly associated with storage of marihuana including scales, sifters, containers, plastic bags, guns, articles of personal property tending to establish the identity of persons in control of the house, vehicle, storage areas, or containers, utility company receipts, rent receipts, addressed envelopes, correspondence and keys; trace evidence such as hair and fibers, mirrors, razor blades, straws, syringes, notebooks, phone lists, receipt books, accounts receivable books; Marihuana.

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[1] Set forth various charges possible under the facts as presently known.

3. The foregoing items are located at or on:[2] dwellings, outbuildings, vehicles, located at the E 1/2 S/W 1/4 S35 T10 R18, of Jefferson County Kansas.

4. This affidavit and application is based on the following facts:[3]

   a) Affiant is a deputy with the Jefferson County Sheriff's Department;

   b) Affiant came in contact with Kasandra L. Riley who resides at Rt 1, Perry, Jefferson County Kansas with Christopher Pifer;

   c) Riley advises affiant that since Oct. 1988 she has been a guest in the Paul Hemme residence. That during these visits she has had the opportunity to observe the presence of cocaine, marijuana, pipes used in smoking marijuana, scales to measure the weight of illicit drugs, a dark brown box containing plastic baggies and cocaine and other drug paraphernelia which is stored in the main bedroom of the Hemme residence.

   d) Riley advises affiant that she and Christopher Pifer had purchased cocaine during these visits at the cost of $25.00 for one fourth (1/4) gram, $90.00 for one (1) gram and $225.00 for an eightball (1/8 ounce).

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[2] Describe specifically and with particularity, the person, place, or means of conveyance for which search is requested.

[3] Set forth facts and circumstances specifically, with particularity, in considerable detail and when and how information acquired – by observation, surveillance, informant, etc., and if by informant, describe how reliability verified – previous proven reliability, corroboration by other physical observation, etc. If necessary, attach additional pages and identify as exhibit. Reduce to writing any other relevant bolstering evidence brought out by judge's oral inquiry into supporting facts under oath.

e) Riley advises affiant that Pifer has purchased marijuana from Hemme at the Hemme residence while in her presence for the cost of $25.00 for a quarter (1/4) ounce, $50.00 for a half (1/2) ounce and $100.00 for an ounce.

f) Riley advises affiant that Paul Hemme has visited her residence in the last month and had with him a quantity of cocaine and marijuana. That Hemme is a well known source of cocaine and marijuana by users of illicit drugs. That several parties owe Hemme large sums of U.S. currency from previous fronted drugs.

g) Riley advises affiant that she last visited the Hemme residence just prior to Christmas because of sickness and confinement to her residence by Pifer. That Hemme during this period had delivered cocaine to Pifer on one occasions [sic].

h) Affiant has checked Jefferson County property records and has found the residence to be located on the 20 acres E 1/2 SW 1/4 35-10-18 Jefferson County Kansas. The land is owned by David J. Hemme.

i) Riley is 18 years of age and moved from Texas to Kansas with Pifer in October of 1988 and has resided with him since that time.

j) Affiant attaches a voluntary Statement from Riley taken on January 26, 1989.

WHEREFORE, the undersigned requests that a search warrant issue for the items described herein, as provided by law.

/s/ Ronald E. Ewing
Affiant-Applicant

Subscribed and sworn to before me on the above shown date and time.

/s/ Dennis Riling
Judge-Magistrate

APPENDIX "D"

ORDER FROM
LAW ENFORCEMENT SYSTEMS INC
P.O. BOX 1835 CORSICANA, TEXAS 75110
(214) 872-2511

VOLUNTARY STATEMENT

(NOT UNDER ARREST)
PAGE NO. 1 OF 1 PAGES

I, KASANDRA LOUISE RILEY, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to INVESTIGATOR R. EWING. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve.

I am 18 years of age, and I live at PO BOX 87, PERRY, KANSAS.

I first met Christipher R Pifer on or about December 5, 1987 at Dallas Texas. We lived together from that point in time. Pifer beat me three or for times while living KR at 328 RT 2-9 Frisco Tex.

We moved to Perry Kansas in Oct of 1988 at PO Box 87 which is behind the cemetary, north of Perry KR. In Oct 1 tried to leave Chris and he beat me with his fists. I had numerous bruises on my face, arms and legs.

About mid November I tried to leave he loaded a 22 rifle KR and double barrell shotgun and pointed them at me. He then shot the coffee table with the shotgun and walls and windows with the 22. He then hit me with the

butt of the shot gun in the eye. When I was able to get away, I stayed at Cody and Inez's trailor in Perry by the bank.

Tonight Chris beat me in a panel wagon on the way back from north Topeka, I do not remember what happened besides being in the truck, then found by people in a ditch and riding to a hospital in an ambulance.

KR Northwest of the house is a [sic] old brokendown shed. In the shed is approximately 130 pounds of marijuana. The marijuana is in trash bags and was picked from along the railroad tracks by Perry.

In the house there are articles that will show proof of the use of cocaine, such as mirrors, razor blades, etc. Also in the house is a coffee table with a shotgun shell discharged into it, and bullet holes in the walls. Also BB holes from the shotgun in a chair. KR_____KR.

I have read each page of this statement consisting of 1 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

Dated at JEFFERSON COUNTY SHERIFF OFFICE, this 26 day of JAN 1989.

WITNESS: R. Ewing #56 /s/ KaSandra L Riley
Signature of person giving voluntary statement

WITNESS: SGT. Dan Duby R #46

APPENDIX "E"

* * *

[p. 2] Judge of the District Court of Jefferson County Kansas. Arguments have been presented to the Court and briefs submitted, I took the matter under advisement to consider the arguments and review the affidavit that was a part of the warrant that was issued. At this time defendant's counsel, Mr. Humpage, is present. State is represented by Mr. Hayes, County Attorney. I wanted to announce on the record my decision on defendant's motion. The Court reviewed the affidavit and the arguments submitted in defendant's motion and considered it at length and concluded as follows: while this at first blush appeared to be a close call as far as the probable cause in support of the warrant that was issued upon inspection and reflection of the information contained therein the Court finds first, that the application for the search warrant was verified by the requesting officer, and that it was supported by a statement which was given to that officer by a third party, now this statement was not a sworn statement but the affidavit was sworn to by the officer and essentially the affidavit relied on information that was provided by this other party which is I suppose technically [p. 3] in some instances considered to be hearsay, but the information reported in an application for search warrant is and may be hearsay is not in itself fatal and can be considered by the Court in issuing the warrant. The Court finds then, as far as the issue of the statement not being sworn that the argument for suppression should fail in that the individual police officer who made the application did make the application upon a verified and sworn application and that application

essentially reiterated information obtained by another party. Another issue that was raised was the issue of the time frame which the information reiterated by the second party referred to. Looking at that statement and considering the totality of the circumstances the Court finds that there had been instances or an instance where the second party had been at the residence which was searched had been inside the residence, that the party had resided in the area of the residence for a period of time and that another person who I think, lived with or cohabitated with the second party had had continuing contact with the occupant of the residence and had from the testimony made [p. 4] other drug purchases at that place. The statement also explains the reason that the second party has not recently been to the residence and that from the statement as I recall was that she had been ill, and that secondly that she had been I would say that her freedom had been apparently restrained to some extent by the party that she was residing with. Looking at the totality of the circumstances this was not just a bald allegation that there were drugs contained in this residence, the second party stated with particularity her understanding, not understanding, her observations as to the inside of the residence, what was contained therein, I think there was reference to some scales, locations where items were located, she also stated with particularity quanities [sic] of drugs which could be purchased and the prices they could be purchased for. Considering all of that in total, the court finds that there was sufficient probable cause for the search warrant to issue and considering the statement in total that the information contained therein was of adequate recent observation and

information such that the search warrant should issue. The defendant's motion to suppress for those reasons

* * *